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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSEPH LEE ROWLAND - - - - *Petitioner*

versus

COMMONWEALTH OF KENTUCKY - *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED

Whether hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be inherently unreliable?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Lee Rowland, by *pro bono* counsel, respectfully petitions that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky decided and filed on July 6, 1995.

OPINION BELOW

The opinion of the Supreme Court of Kentucky decided and filed on July 6, 1995 [Appendix] is reported at 901 S.W.2d 871.

JURISDICTION

The opinion of the Supreme Court of Kentucky was decided and filed on July 6, 1995. This Court's jurisdiction

is invoked pursuant to 28 U.S.C. §1257(a) and United States Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This is a first-degree assault case involving the shooting of the victim Carol Rowland allegedly by her stepson Petitioner Joseph Lee Rowland.

Following the introduction of the victim's direct testimony, Petitioner withdrew his plea of not guilty to two counts of first-degree assault and entered a conditional plea of guilty to reduced charges of second-degree assault. The conditional plea gave Petitioner the right to appeal the ruling on the hypnotically enhanced testimony of the victim Carol Rowland.

> "You are still going to have a right to appeal in this case because of the type of plea that you are entering is called a conditional plea. The Court has made some rulings in this case. In particular it has ruled that the victim in the case, Carol Rowland, has been permitted to testify concerning the events that occurred,

> and she has been permitted to testify recognizing the fact that she has been under hypnosis." [Trial judge, Transcript of Proceedings, May 28, 1992, p. 8]

Petitioner's motion to suppress the victim Carol Rowland's hypnotically enhanced testimony had been denied. [Transcript of Proceedings, May 27, 1992, Section I, pp. 121-122, 126]

This is a classic case of "developing" and "hardening" testimony through hypnosis. The progression is clear.

On January 29, 1991, the victim Carol Rowland was shot. [Carol Rowland trial testimony, Transcript of Proceedings, May 27, 1992, Section II, pp. 104, 111]

From January 29 through February 10, 1991, the victim was treated at the hospital under the care of physician Dr. James F. Bardgett. [Bardgett Deposition, May 12, 1992, p. 5] During that time, the victim never told Dr. Bardgett who shot her.

> Q: From January the 29th, 1991, to February the 10th, 1991, Carol Rowland never told you who shot her; is that correct?
>
> A: Yes, that's correct. [Bardgett Deposition, p. 25]

In fact, Dr. Bardgett was under the impression that on January 29, 1991, the victim "remembered the incident well," but "that *she did not know who shot her.*" [Emphasis added. Bardgett Deposition, p. 30] Dr. Bardgett's report indicated, "[A]ll she remembers is being shot in the back." [Bardgett Deposition, p. 22]

During this same time frame, January 29 through February 10, 1991, when others at the hospital asked her who shot her, the victim did not identify Petitioner.

> Q: After you got to the hospital on January 29th of 1991, . . . [d]o you remember any of the other hospital personnel asking you questions about how it occurred, if they did?

A: Yes. Dr. Pettit. . . . Social Services.

Q: Now, did you tell Doctor Pettit or Social Services or for that matter any of the other medical personnel, if you know, that you saw Joe Rowland shoot or have a gun in his hand?

A: No. [Carol Rowland trial testimony, T.P. II, p. 131]

Not long after the shooting, the victim was interviewed by case detective Steve Kellam. She advised him that she did not recall seeing Petitioner with a gun in his hand.

Q: When you first talked to Detective Kellam about the shooting, did you tell him that you recall seeing Joe Rowland with a gun in his hand?

A: No. [Carol Rowland trial testimony, T.P. II, p. 132]

The difficulty for Detective Kellam's investigation was that the victim could not identify Petitioner as the person who shot her.

On February 4, 1991, Detective Kellam procured a polygraph examination of Petitioner. But the Kentucky State Police polygraph examiner concluded Petitioner "told the truth during this examination" when he answered "No" to the question, "Did you pull the trigger to the gun that shot your 'stepmother' Carol?" [Joseph Lee Rowland Polygraph Report, Prosecution Discovery Materials, Docket Entry No. 12, Record pp. 35-36]

On April 30, 1991, psychiatrist Dr. Bruce A. Snider began treating the victim. [Snider Deposition, May 21, 1992, p. 6] He diagnosed her condition as "post-traumatic stress disorder and secondary depression" which characteristically includes "the symptom of psychogenic amnesia, which is difficulty recalling some aspects or all aspects of the trauma." [Snider Deposition, pp. 6-7, 9]

Q: Did Carol Rowland exhibit this characteristic of post-traumatic stress disorder in that she had an inability to recall some aspects of the event?

A: Yes. [Snider Deposition, p. 10]

Finally, the victim was referred to an F.B.I. hypnotist-consultant, Dr. William C. Wester. [Wester trial testimony, T.P. I, pp. 41, 49-50]

On September 30, 1991, Dr. Wester interviewed the victim. On October 16, 1991, he hypnotized her. [Wester trial testimony, T.P. I, pp. 43-44, 46] Dr. Wester testified that, in his initial interview with the victim on September 30, 1991, the victim was not "absolutely sure" Petitioner had shot her.

> Q: All right, let's — well, "I think I saw Joe Rowland shoot me," is that what you think it says?
>
> A: Right.
>
> Q: She wasn't absolutely sure at that point, is that true?
>
> A: That's true.
>
> Q: So, when she came in to you on the first session, she wasn't one hundred percent sure at that point in time, is that correct?
>
> A: Yeah, apparently so. [Wester trial testimony, T.P. I, p. 57]

In fact, the victim stated right out why she had been referred to Dr. Wester for hypnosis:

> BY DR. WESTER: And so at this point in time, has anyone been charged?
>
> BY MRS. ROWLAND: No. Everything to this day is circumstantial. And Detective Kellam said, "I know he did it, but we have to have some concrete evidence." [Statement of Carol Rowland to Dr. William Wester, September 30, 1991, p. 10]

On October 16, 1991, Dr. Wester hypnotized the victim. As Dr. Wester stated, "[H]er session went well, and I felt that hypnosis was helpful again in enhancing some of those fine memories." [Wester trial testimony, T.P. I, p. 49]

On May 27, 1992, the victim testified at trial that Petitioner shot her.

> Q: Now, what next occurred as you recall?
>
> A: I was shot again while Mark was in the process of getting the kids down to the ground, and I turned around real quick because of the sound and I saw Joe standing in the, on the front part of the house, right at the edge of the house and the deck with the gun in his hand. . . . He turned back around the front of the house really fast. [Carol Rowland trial testimony, T.P. II, pp. 113-114]

Based on this testimony, Petitioner changed his plea to a conditional plea of guilty — conditioned on the right to appeal the issue of excluding hypnotically enhanced testimony. *Rowland, supra,* 901 S.W.2d at p. 871.

REASON FOR GRANTING THE PETITION

Hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be inherently unreliable.

The United States Supreme Court is well aware that there is chasmal division among the states regarding the exclusion of hypnotically enhanced testimony of witnesses. *Please see* the splits delineated in footnotes fourteen, fifteen, and sixteen of *Rock* v. *Arkansas,* 483 U.S. 44 (1987), at pp. 57-58. The conflict among state courts of last resort is delineated at length in "Admissibility of Hypnotically Refreshed Or Enhanced Testimony," 77 *A.L.R.4th* 927-983, and update.

In *Rock,* this Court held that "a *defendant* in a criminal case has the right to take the witness stand and to testify in his or her own defense," including "hypnotically refreshed testimony." *Id.,* p. 49. This Court reasoned, "There is no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Id.,* p. 52.

This Court in *Rock* specifically reserved to another date the issue regarding exclusion of "testimony of previously hypnotized *witnesses.*"

> This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue. *Rock, supra,* 483 U.S. at p. 58, n. 15.

The present Petition for Certiorari specifically requests this Court to now consider and resolve this important question regarding exclusion of hypnotically refreshed testimony of witnesses other than a defendant.

Petitioner respectfully submits that testimony of a witness that has been hypnotically enhanced is unreliable and difficult to confront, so that it should be completely excluded on the subject enhanced.

In *Rock,* this Court acknowledged the "use of hypnosis in criminal investigations . . . is controversial." *Rock, supra,* 483 U.S. at p. 59. In *Rock,* this Court observed that "[t]hree general characteristics of hypnosis may lead to the introduction of inaccurate memories:

> the subject becomes 'suggestible' and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to 'confabulate,' that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences 'memory hardening,' which gives him great confidence in both true and false memories, making effective cross-examination more difficult." [Scientific citations omitted.] *Rock, supra,* 483 U.S. at pp. 59-60.

In *Rock,* Chief Justice Rehnquist, Justice White, Justice O'Connor, and Justice Scalia would have upheld Arkansas' rule excluding hypnotically enhanced testimony *of a defendant.* They were outvoted only on the ground that *a defendant* has a "constitutional right to testify in her own

defense." *Rock, supra,* 483 U.S. at p. 63. The present Petition is not burdened by such a ground.

Indeed, it is respectfully submitted that hypnotically enhanced testimony must be excluded because its "trustworthiness is inherently suspect," as observed by the dissenting Justices in *Rock, supra,* 483 U.S. at p. 64.

In its opinion below, the Supreme Court of Kentucky divided 4-3 to allow the hypnotically enhanced testimony of the witness. The four-member majority so held because ~~it~~ determined that the hypnotically enhanced testimony of the witness was similar to her pre-hypnosis statement.

> In her statement given under hypnosis, Carol's description of the events leading up to the shooting showed "very little difference" from her pre-hypnosis description. Dr. Wester described her statement given under hypnosis as "basically, just more fine-tuned." *Rowland* v. *Commonwealth,* Ky., 901 S.W.2d 871, 872 (1995) [Appendix]

In a dissenting opinion written by Chief Justice Stephens, the three-member minority would have rejected the hypnotically enhanced testimony of the witness.

> The post-hypnotic statements of the witness, in my view, should be found *inadmissible per se.* The testimony in question inherently involves dangerous problems with reliability. [Court's emphasis.] *Rowland, supra,* 901 S.W.2d at p. 874.

Chief Justice Stephens wrote that even a favorable comparison of "the witness' pre- and post-hypnotic statements" is not enough "to protect the person against whom this testimony is directed."

> I recognize that the majority addresses these issues in its resolution of the case by examining the reliability of the statements in looking at both the witness' pre- and post-hypnotic statements. I cannot agree that this is enough to protect the person against

whom this testimony is directed. An examination of this type does not alleviate other potential risks associated with hypnosis.

For example, it is often recognized that persons who have undergone hypnosis will begin to believe with more certainty the memories recalled under hypnosis. [Citation omitted.] As a result, the witness will appear more believable at trial. Further, witnesses who have undergone hypnosis may confuse the memories prior to hypnosis with recall *or* fabrications that occurred during hypnosis. [Citation omitted.] When this confused witness takes the stand for a third reiteration of his or her testimony, there exists the possibility that a third version of events or testimony may result. The majority's treatment of hypnotic statements does nothing to address these potentially harmful effects. *Rowland, supra,* 901 S.W.2d at p. 874.

Many cases from the highest courts of the various states catalog the inherent unreliability of hypnotically enhanced testimony of witnesses. These cases relate the factors which universally condemn hypnotically enhanced testimony as unreliable. For instance, in *State* v. *Haislip,* Kan., 701 P.2d 909 (1985), cert. denied 474 U.S. 1022, the Supreme Court of Kansas catalogued "suggestibility," "confabulation," and "increased confidence."

Given the problems inherent in the hypnotic process, such as the enhanced suggestibility of the subject, the tendency to confabulate when there are gaps in recollection, and the increased confidence in the truthfulness and accuracy of posthypnotic recall which may preclude effective cross-examination, hypnotically refreshed testimony is simply too unreliable to be used as evidence in a judicial setting. *Haislip, supra,* 701 P.2d at pp. 925-926.

Also, for instance, in *Commonwealth* v. *Nazarovitch,* Pa., 436 A.2d 170 (1981), the Supreme Court of Pennsylvania

catalogued enhanced confidence which "cannot be undermined through cross-examination."

> [T]he hypnotic subject, upon awakening, is often imbued with a confidence and conviction as to his memory which was not present before. Prehypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis, into certitude, with the subject unaware of any suggestions that he acted upon or any confabulation in which he engaged. The subject's firm belief in the veracity of his enhanced recollection is honestly held, and cannot be undermined through cross-examination." *Nazarovitch, supra*, 436 A.2d at p. 174.

These factors demonstrating the unreliability of hypnotically enhanced testimony are well established in the opinions of the state courts. These factors demonstrating unreliability are set forth by this Court in *Rock* v. *Arkansas, supra*, 483 U.S. at 59-60, with citations to scholarly literature. In the event that certiorari is granted in the present case, these factors can be located in the cases and literature and developed at length in briefs on the merits.

Defense counsel raised these matters in the trial court. [Motion to Suppress Hypnotically Refreshed Testimony, Docket Entry No. 18, Record pp. 60-63; *Rowland, supra*, 901 S.W.2d at p. 872] Counsel on appeal raised these matters before the Supreme Court of Kentucky, raising Fifth Amendment due process and Sixth Amendment confrontation considerations implicated by the inherent unreliability of hypnotically enhanced testimony of a witness. [Brief for Appellant before the Supreme Court of Kentucky, at p. 24; *Rowland, supra*, 901 S.W.2d, dissenting opinion, at p. 874]

It is respectfully submitted that hypnotically enhanced testimony of a witness in a criminal case is inherently unreliable, in violation of a defendant's rights to due process and confrontation, so that it should be excluded.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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